IN THE

# UNITED STATES CIRCUIT COURT OF APPEALS

## FOR THE NINTH CIRCUIT

NO. 7772

GEORGE D. HUBBARD,

*Appellant,*

—vs.—

UNITED STATES OF AMERICA,

*Appellee.*

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division.

HONORABLE JOHN C. BOWEN, *Judge*

## BRIEF OF APPELLEE



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## SUBJECT INDEX



## TABLE OF CASES CITED

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### STATEMENT OF THE CASE

At the trial of the cause in question, two separate cases involving the appellant George D. Hubbard were, by consent of all parties, tried together. In the first, the appellant, George D. Hubbard, was charged with having entered into a criminal conspiracy with Samuel Lewis, Perry V. Wilcox, and Howard R. Crow, to em-

bezzle and wrongfully convert to their own use intoxicating liquors then in possession of George D. Hubbard by virtue of his office as Collector of Customs for the United States Customs Collection District No. 30, and in Count 2 of entering a conspiracy with Samuel Lewis, Perry V. Wilcox and Howard R. Crow, to defraud the United States by impairing, obstructing, or defeating the lawful function of the Treasury Department of the United States in its administration of the Tariff Act, first by converting to their own use, or to the use of some one or more of them, intoxicating liquors which were in the possession, or might thereafter come into the possession of the defendant, George D. Hubbard, by virtue of his office as Collector of Customs for the United States Customs Collection District No. 30; and second, by themselves executing and causing others to execute false certificates showing the destruction of the liquor converted to their own use; and third, by falsifying or causing the falsification of a record known as "Receipt and Delivery of Seized Goods".

To this charge, the jury returned a verdict of not guilty as to all defendants (except Lewis who had not been apprehended).

In the second case, the one now under consideration, the appellant George D. Hubbard was charged

specifically with having converted to his own use, and thereby embezzling, eighty-four (84) quarts of intoxicating liquors which had come into his possession and under his control as Collector of Customs for the United States Customs Collection District No. 30. In this cause, the Jury returned a verdict of guilty.

Counsel for appellant, as stated by him in his brief, has not brought before this Court all of the evidence in the case. The only evidence disclosed is the following:

> "Thereupon the plaintiff, to sustain the issue upon its part, called several witnesses whose testimony tended to show that the defendant had unlawfully converted intoxicating liquor and alcohol to his own use, and that he had delivered whiskey and alcohol to the United States Coast Guard Service and to the United States Coast Guard and Geodetic Survey without first obtaining authority so to do from the Commissioner of Customs as prescribed by the Regulations of the Secretary of the Treasury, promulgated under the Tariff Act of 1930, and that he authorized and certified to the destruction of intoxicating liquors and alcohol, which destructions had not been carried out in the manner prescribed by the Regulations of the Secretary of the Treasury, promulgated under the Tariff Act of 1930, (Tr. 14, 15).
>
> "Thereupon, at the close of plaintiff's case, the defendant introduced testimony in his own behalf tending to rebut the evidence presented by the plaintiff." (Tr. 15).

The certificate of the trial Judge reads as follows:

> "The foregoing 29 pages truthfully set forth

proceedings had upon the trial of the defendant George D. Hubbard, *insofar* as they are stated. In addition to the testimony set out in said pages hereinabove, other testimony relative to and tending to prove the guilt of the defendant with respect to the material allegations contained in the indictment was introduced, received and considered." (Tr. 47).

It is the contention of appellee, (1) that the indictment was sufficient, and that the demurrer thereto was properly overruled; (2) that the instructions as given by the Court constituted a fair presentation of the law, and that no error is to be found therein; (3) it is the further contention of appellee that under the certificate above given, where all of the material testimony is not contained in the record, that appellant is confined in his appeal to errors in the indictment itself, and cannot complain of instructions given by the Court unless he can show that by the instructions a defendant's constitutional right has been invaded.

## ARGUMENT

### Assignment No. I.

### Demurrer

The only question raised by appellant as to the demurrer is that the indictment did not negative owner-

ship of the intoxicating liquor in the defendant. The indictment in the present case is almost identical with the indictment in the case of *Ford v. United States*, 3 Fed. (2d) 104. In that case, the first count of the indictment, after describing the defendants as officers and employees in the internal revenue service of the United States, charged that the said defendants did

> "Unlawfully and feloniously convert to their own use and embezzle certain property which had come into their possession and under their control in the execution of their said offices aforesaid, and under color and claim of authority as such officers aforesaid, to-wit, a large quantity of intoxicating liquor, to-wit, one hundred fifty-three (153) quarts of whiskey."

The same question was raised by defendants in that case as is urged by the appellant in this case, namely, that the indictment did not allege that the intoxicating liquor did not belong to the defendant. In upholding the indictment, the Court said:

> "An allegation of ownership of property stolen or embezzled is usually required in indictments, not because ownership is material, but for the purpose of identification, so that a defendant may prepare his defense and protect himself against a subsequent prosecution for the same offense. An allegation that the owner was unknown would have been sufficient in this case, and, it may be conceded, would have made the indictment better . But we think the challenged counts are sufficient, as the defect is at most one of form only. The property could not have been that of the de-

> fendants, or any of them, and whether it belonged to the United States, or some person other than the defendants, was immaterial. It came into the custody of the defendants under circumstances which made their taking of it an offense under the statute."

Likewise, *Hoback v. United States*, 284 Fed. 530, 532.

Counsel's Brief refers to 20 Corpus Juris 416 as authority for the doctrine that the government must negative ownership in the defendant. The authority for the doctrine therein stated is found in *State v. Ensley*, 97 Northeastern 113, 177 Indiana 483, referred to in the Notes to the section quoted. In that case, after stating the general rule, the Court upheld the indictment because it read:

> "That said sum of money had come into the hands of Oliver P. Ensley, as such treasurer, by virtue of his office as treasurer."

See also *United States v. Dimmick*, 112 Fed. 352. On page 353, the Court said:

> "If, however, it should be conceded that the indictment would have been better if it had expressly charged that the defendant did not, at the date he was required so to do, nor at any time prior thereto, make deposit of the money referred to, still it does not follow that judgment should be arrested because of the omission of this express charge, as there is an implied negative of the fact that the deposit was made before the date at or within which it was required to be made, in the allegation that defendant knowingly, wilfully, and

feloniously failed to make the deposit as required."

And further, in the same case, the Court said:

"The Statute reads—

'No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceedings thereon be affected by reason of any defect or imperfection in the matter of form only, which shall not tend to the prejudice of the defendant'."

In the case of *United States v. Greene*, 146 Fed. 779, the Court said:

"The obligation is on the government in every case to make out its charge against the accused beyond reasonable doubt. It is a presumption of law that the prisoner is innocent. When the *charge* is made, it is then the duty of the court, in obedience to this modern practice in criminal cases, to discourage technical objections to indictments unless they allege defects projudicial to the prisoner in his defense."

In the case of *Grandi v. United States*, 262 Fed. 123, the Court said:

"A motion to quash the third count, as not charging that the goods were in fact so stolen, was denied. There is an absence of such specific allegation. But while the count was thus technically subject to criticism, yet, in view of the frame of the indictment taken as a whole, plaintiff in error could not well have been misled to his prejudice. The count fairly informed the accused of the

charge against him and sufficiently so as to enable him to prepare his defense and to protect him against further prosecution therefor.

"The charge that defendant knew the goods to have been stolen naturally implies that the goods had been in fact stolen. The verdict should not be reversed on account of a defect so obviously technical and unsubstantial."

In the present case, the defendant having been clearly apprised of the nature of the charge, the demurrer to the indictment was properly overruled.

Assignments Nos. VIII and IX.

Counsel for appellant frankly admits that he made no requests for the instructions which he says should have been given. His contention is based upon the fact that said instructions are so material that the Court of his own volition should have given the same.

While it is true that the Court must of its own volition set forth sufficient in his chage to inform the Jury of the necessary facts to be proven, it is only in the rare and exceptional case that a verdict can be set aside on that ground.

The general rule is, of course, that a party cannot complain of instructions on failure to charge relative to the issue, instruction concerning which a request has not been made. *National Biscuit Co. v. Litzky*, 22 Fed. (2d) 939.

A careful reading of the instructions of the Court will demonstrate that the Court very clearly set forth the essential elements of the crime, not only of conspiracy, but also of embezzlement. In his instructions, and throughout the course of the trial, the Court was extremely careful to see that all of the rights of the defendant were protected. Completeness of the instructions, and the fairness of them, was such that counsel for both sides commended the Court at the conclusion of the trial for the instructions given to the jury, (Tr. 43, 44).

A paragraph from the case of *Wolf v. United States*, 283 Fed 885, on page 889, is especially pertinent to the present contention of counsel:

> "Mistakes of omission or incompleteness of a charge may be prejudicial, but whether section 269 of the Judicial Code, as amended, requires us to note unassigned error of this nature may be seriously questioned. The duty of counsel to point out the omissions, to object and to except, is certainly as great as the duty of the court to include all that might properly be inserted in the charge. Certain essential elements in the crime, in view of all the evidence in a given case, may become quite unimportant due to the undisputed character of the evidence or to the fact that such necessary facts are admitted during the trial. Naturally under such circumstances the court would not elaborate upon that phase of the case, the most successful charge brings sharply and prominently to the jury's at-

tention the disputed and crucial issues, and best serves its purpose when it makes intelligent determination by the jury of such issues unavoidable. Certainly this court is not justified in disturbing a judgment when the omission of the court to elaborate upon one phase of the case is in reference to a subject concerning which there is little or no dispute. Likewise the court's failure to dwell upon the phase of the case not in serious dispute is generally beneficial to the defendant, and counsel's failure to direct attention thereto may well have been due to a desire not to force an issue in support of which his position was untenable."

Assignment No. II.

"All United States Courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the Court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." 28 U. S. C. A. 391, 40 Stat. 1181.

The various Courts have construed this Statute to mean that the burden is now on the plaintiff in error to show not only that error has occurred but, in addition, that the error was prejudicial.

"We gather the Congressional intent to end the practice of holding that an error requires a reversal of the judgment, unless the opponent can affirmatively demonstrate from other parts of the record that the error was harmless, and now to

> demand that the complaining party show to the reviewing tribunal from the record as a whole that he has been denied some substantial right whereby he has been prevented from having a fair trial." *Simpson v. United States*, 289 Fed. 191.

See also *Shuman v. United States*, 16 Fed. (2d) 457; *Nolan v. United States*, 75 Fed. (2d) 65; *Horning v. District of Columbia*, 254 U. S. 136.

In the discussion of this appeal, we must always bear in mind that two cases were being tried together.

The instruction referred to on page 5 of appellant's brief was given by the Court with a special refererence to the conspiracy charge. In that case, the jury brought in a verdict of not guilty. As applied to the present case, however, the instruction as given by the Court was correct, and certainly was not prejudicial.

Counsel says, (Appellant's Brief, page 4):

> "Let us assume, for example, that the defendant had taken alcohol, etc., and had it poured into radiators of government cars to be used for antifreeze, * * * or suppose he took the liquor which had been seized and *before* obtaining authority * * * he delivered that to the Coast Guard * * * to be used for governmental purposes."

The Court, (Tr. 36) eliminated any such possibility by the following instruction:

"You are instructed that intent is an essential element of the crime charged, and it is the duty of the government to prove guilty knowledge on the part of each defendant, and before you can find any defendant guilty of such crime, you must find that each defendant had an intention to take part in the conspiracy and had an intent to defraud the United States, or to commit an offense against the United States, as charged in the indictment. And, if you believe from the evidence that one or more of the defendants did not have such intent, you must acquit such defendant or defendants."

Then again, (Tr. 34):

"You are instructed that the law gives rise to the presumption that persons in the discharge of their duties are always prompted by honest motives. You will accord to the defendants herein, and each of them, the benefit of such presumption until it is overcome by evidence convincing you beyond reasonable doubt and to a moral certainty that a particular defendant or particular defendants are or were not prompted by such honest motives."

In the embezzlement case, appellant was convicted. The Court was very careful in his instructions to separate the two cases. His instruction in the present (the embezzlement case) reads as follows:

"I have heretofore defined embezzlement. In the second case (the case here involved) the defendant, George D. Hubbard alone is charged with embezzling 84 quarts of intoxicating liquor which had been seized on board the motorship Heranger, and which came into his possession as Collector of Customs. If you find this liquor had been seized

under the customs laws, and did come into his possession as Collector of Customs, and he appropriated it, or any of it, to his own use, or permitted others to do so, with intent to deprive the true owner thereof, he would be guilty as charged."

That this instruction is correct is not disputed.

Assignments Nos. III and IV.

Counsel's third and fourth assignments of error are based upon the Court's instruction defining criminal intent. The Court's instructions on the question of intent are as follows.

"You are instructed that intent is an essential element of the crime charged, and it is the duty of the government to prove guilty knowledge on the part of each defendant, and before you can find any defendant guilty of such crime you must find that such defendant had an intention to take part in the conspiracy and had an intent to defraud the United States, or to commit an offense against the United States, as charged in the indictment. And, if you find from the evidence that one or more of the defendants did not have such intent, you must acquit such defendant or defendants. Intent is an ingredient of crime. It is psychologically impossible for you to enter into the minds of the defendants and determine the intent with which they operated. You must, therefore, determine the motive, purpose, and intent from the testimony which has been presented and you will consider all the circumstances disclosed by the witnesses as testified to, bearing in mind that the law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts, knowingly or intentionally committed, cannot be justified on the

ground of innocent intent. The color of the act determines the complexion of the intent. Intent to defraud is presumed when an unlawful act is proved to be knowingly committed."

This instruction is almost identical with the instruction given in *Agnew v. United States*, 165 U. S. 36, 41 L. Ed. 625.

> "The law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts knowingly or intentionally committed can neither be justified nor excused on the ground of innocent intent. The color of the act determines the complexion of the intent. The intent to injure or defraud is presumed when the unlawful act, which results in loss or injury, is proved to have been knowingly committed. It is well settled, to which the law applies in both civil and criminal cases, that the intent is presumed and inferred from the result of the action."
>
> "In our opinion there is evidence tending to establish a state of case justifying the giving of the instruction which was unexceptional as a matter of law."

See also *McKnight v. United States*, 111 Fed. 736; *Savitt v. United States*, 59 Fed. (2d) 543.

In the case of *McGregor v. United States*, 134 Fed. 187, on page 197, the Court said:

> "The record thus discloses that the jury were, we may say, repeatedly charged by the court that the actual intention to defraud was an essential element of the crime, without which no offense

> could have been committed, and that, unless such intention was found by the jury from the evidence, the defendants should be found not guilty. As the record makes the case, this additional instruction of the court was not intended to modify or set aside any of the instructions theretofore given, but was intended to explain to the jury a method provided by law by which the jury might, from the evidence, find whether or not such intention existed. It is well settled that the law presumes that every man intends the legitimate consequence of his own acts, and that such acts, when knowingly done, cannot be excused on the ground of innocent intent. In both civil and criminal cases the intent with which an act is done is inferred from the result of the act itself, and the law presumes that every man intends the legitimate consequence of his own acts."

And the Supreme Court of the United States, in the case of *United States v. James A. Patten*, 226 U. S. 525, 57 L. Ed. 333, an action by the United States against the defendant for restraint of trade:

> "And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts, and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produced the result which the statute is designed to prevent, they are in legal contemplation, chargeable with intending that result. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 243, 44 L. Ed. 136; 148 Sup. Ct. Rep. 96;

*United States v. Reading Co.* 226 U. S. 324, 370, ante, 243, 33 Sup. Ct. Rep. 90."

## CONCLUSION

In this case, the defendant was honestly apprised of the issues confronting him, was given a fair and impartial trial by the Court and the jury. No error having occurred prejudicing his rights, and from the evidence brought before this Court no valid grounds being shown how the jury in a second trial would have reached any different verdict than in the present trial, counsel for the government respectfully submits that the judgment of the Court should be affirmed.

*Respectfully submitted,*

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